NO. 84-1291

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In the
Supreme Court of the United States

OCTOBER TERM, 1984

PARK AVENUE INVESTMENT & DEVELOPMENT, INC., a Florida corporation, MARK LOSEE, RALPH SNELGROVE, DREW APGAR, and EVERETT HENSLEY, General Partners d/b/a BAREFOOT MAILMAN, LTD., a Florida limited partnership, BAREFOOT MAILMAN OWNERS ASSOCIATION, INC., a Florida non-profit organization, BAREFOOT MANAGEMENT COMPANY, a Florida corporation, CAXTON, LTD., a British Virgin Island corporation, and MARK LOSEE and DREW APGAR, individually,

Petitioners,

v.

DONALD I. BARKHEIMER, II, PEGGY A. BARKHEIMER, his wife, DONALD L. BARKHEIMER, G. LOUISE BARKHEIMER, his wife, HARRY RANKER, VIRGINIA RANKER, his wife, DENNIS REED, SANDRA REED, his wife, GENEVA L. BARKHEIMER, and JOSEPH D. FARISH, JR. and ROBERT V. ROMANI, d/b/a FARISH, FARISH & ROMANI,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents take issue with the question presented by the Petitioners (Page i) and respectfully submit that the questions presently before this Court are as follows:

1) Should certiorari be granted where it appears from the record that:

a. The decisions of the Florida Trial and Appellate Courts were based upon adequate non-federal grounds; and

b. Petitioners did not present a federal question in the Florida Courts and are first raising it in this Court.

2) Did the Florida Courts deprive Petitioners of equal protection of the law in applying common law principles dealing with purging usury and waiver to this case, rather than Florida's Criminal Usury Statute where it appears from the record that:

a. No usury violation had occurred; or alternatively,

b. The Petitioners waived any usury defense they may have had.

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Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

The Respondents respectfully request that the Petitioners' Petition for Writ of Certiorari be denied. It appears from the record that the decisions of the Florida Trial and Appellate Courts were based upon adequate non-federal grounds. Specifically, the record shows that the Petitioners were not denied equal protection of the law as concerns Florida's Criminal Usury Statute, §687.071, because no usury violation had occurred, or alternatively, the Petitioners waived any usury defense they may have had. Further, the Petitioners did not present a federal question in the Florida courts and are first raising it in this Court.

In this Brief, the following symbols will be used:

(PET.BR.)	Petitioners' Brief
(PET.APP.)	Petitioners' Appendix
(RES.APP.)	Respondents' Appendix

STATEMENT OF THE CASE AND FACTS

The Statement of the Case and Facts in the Petition (PET.BR. 4-8) is accepted in part and rejected in part by the Respondents. There are certain factual matters which were omitted and of which this Court should be aware.

First, it is important that this Court be aware of who the parties are in this case and how they interrelate. Two of the Petitioners, Drew Apgar, an attorney, and Mark Losee, a former bank officer, formed Park Avenue Investment & Development, Inc. to develop and convert ocean front buildings into time share resorts. The purpose of this Florida corporation was to solicit funds for the conversion of the Barefoot Mailman Hotel in Broward County, Florida, into the Barefoot Mailman Time Share Resort.

On or about November 14, 1979, Barefoot Mailman, Ltd., purchased the Barefoot Mailman Hotel for the purpose of converting it into time share units for sale. Barefoot Mailman, Ltd., then transferred this real property to the Barefoot Mailman Owners Association, Inc. on May 20, 1980. This transfer was pursuant to an agreement between Barefoot Mailman, Ltd., and Barefoot Mailman Owners Association, Inc., whereby Barefoot Mailman, Ltd., would develop the Barefoot Mailman Hotel and receive the net sales of the time share units converted.

Being that the Respondents, the Barkheimers, were clients of attorney Drew Apgar, he solicited them and the other Respondents to invest in Park Avenue Investment & Development, Inc., under a profit sharing plan. Park Avenue Investment & Development, Inc., then defaulted under this profit sharing plan and executed promissory notes to the Respondents for the deficiency due under this profit sharing investment plan. Park Avenue Investment & Development, Inc., also defaulted under these promissory notes and this resulted in the Respondents initiating several lawsuits to recover under these promissory notes.

On September 17, 1981, a stipulation was entered into between the Respondents and Park Avenue Investment & Development, Inc., Mark Losee and Drew Apgar, for the settlement of these lawsuis. (PET.APP.A—Stipulation attached as an exhibit to the Complaint). This stipulation was expressly accepted by the parties, "...as a resolution of the issues necessarily involved in the captioned cases...". It should also be noted that the figures listed in Section I of the Stipulation, which are the total amounts owed to each Respondent, were supplied by the Petitioners and were not inserted at the suggestion or insistence of the Respondents.

As part of the aforesaid stipulation, Park Avenue Investment & Development, Inc., agreed to pay monies they admitted were owed to the Respondents and secured the repayment of this money by the conveyance of time share units in the Barefoot Mailman Resort. Park Avenue Investment & Development, Inc., then failed to make any of the payments agreed to under this stipulation. Time share units were then properly executed and conveyed to the Respondents by a partner of the Barefoot Mailman, Ltd., and an officer of the Barefoot Mailman Owners Association, Inc.

On or about February 15, 1982, Barefoot Management Company was formed for the purpose of managing the Barefoot Mailman Time Share Resort. Petitioners then demanded that the Respondents deliver the time share units conveyed to them and the Barefoot Management Company denied the Respondents entry to these units.

As a result of these actions by the Petitioners, the Respondents then filed another lawsuit for declaratory relief, injunctive relief and monetary damages. (PET.APP.A).

The remaining Statement of the Case, as presented by the Petitioners (PET.BR., page 5, 2nd paragraph—page 8), is accepted by the Respondents. The Respondents, however, take exception to the Petitioners' statement that they were denied equal protection of the law because the Fourth District Court of Appeal found that the common law set forth in *GUNN PLUMBING, INC. V. DANIA BANK*, 252 So.2d 1 (Fla.1971) is controlling rather than §687.071, Florida Statutes. The Respondents submit, as will be more fully expressed in their argument, that the enactment of Florida Statutes §687.071 did not impliedly

overrule or change the holding in the *GUNN PLUMBING* case. The purging of usury and waiver of usury defense principles enumerated in the *GUNN PLUMBING* case still apply after the enactment of §687.071, as the Court found they applied to the instant case, and accordingly, the Petitioners were not denied equal protection of the law.

ARGUMENT

1) Should certiorari be granted where it appears from the record that:

a. The decisions of the Florida Trial and Appellate Courts were based upon adequate non-federal grounds; and

b. Petitioners did not present a federal question in the Florida Courts and are first raising it in this Court.

This Court has consistently held that it will not review a State Court judgment based upon an adequate and independent non-federal ground, even though a federal question may be involved and perhaps wrongly decided. *CENTRAL LAND COMPANY V. LAIDLEY*, 159 U.S. 103, 40 L.Ed. 91 (1895). Insofar as a decision turns upon questions of state law it is controlling and this Court's power of review is restricted to federal questions. *CHESAPEAKE & OHIO RAILWAY COMPANY V. PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA*, 242 U.S. 603, 61 L.Ed. 520 (1917).

In *BRINKERHOFF-FARIS TRUST & SAVINGS COMPANY V. HILL*, 281 U.S. 673, 74 L.Ed. 1107 (1930), this Court stated:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this Court's power to review decisions of state courts is limited to their decisions on federal questions; and the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court." *BRINKERHOFF-FARIS* at 680.

In addition to limiting its jurisdiction to the review of federal questions, this Court has often held that it must affirmatively appear from the record that the federal question was specially set up or claimed in the state court and was acted upon by the state court adversely to the claimant, otherwise jurisdiction does not exist. *CENTRAL LAND COMPANY V. LAIDLEY, supra.*

Based upon the foregoing holdings by this Court, the Respondents respectfully submit that this Court should not exercise its certiorari jurisdiction because the Petitioners failed to present a federal question in the Florida Courts and, in fact, a federal question does not exist in this case.

Petitioners state (PET.BR. Page 3) that this Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3). (RES.APP.A). Relying on that statute, the Petitioners claim that the federal question in this case is whether they were denied equal protection of the law, contrary to the Fourteenth Amendment to the United States Constitution, by the Florida Fourth District Court of Appeal's finding

that the common law set forth in the *GUNN PLUMBING* case controlled, rather than §687.071, Florida's Criminal Usury Statute, which statute was enacted subsequent to the *GUNN PLUMBING* decision. (PET.BR. Page 7).

In response, Respondents first point out to this Court that the Petitioners did not raise this Fourteenth Amendment federal question in the Florida Courts. Specifically, the Petitioners did not argue to the trial court, the Fourth District Court of Appeal or the Supreme Court of Florida, that applying the *GUNN PLUMBING* case to the case at bar, rather than applying the subsequently enacted Florida Criminal Usury Statute, would be denying them equal protection. In fact, this federal question is first being raised before this Court in the Petitioners' Brief.

Additionally, as will be more fully expressed in the next section of the Respondents' Argument, the Respondents assert that, in fact, a federal question does not exist at all in the instant case. In order for the Petitioners to successfully show that they were denied equal protection concerning the enforcement of §687.071, Florida Statutes, they would have to cite some authority for the proposition that this statute impliedly overruled or changed the *GUNN PLUMBING* decision. The Petitioners have cited no such authority because the purging of usury and the waiver of usury defense principles enumerated in the *GUNN PLUMBING* case are still good and valid legal principles in the State of Florida and these principles were totally applicable to the facts in this case.

Based upon the foregoing facts and authorities, since a federal question was not raised in the Florida State Courts and was not decided by these State courts, the Respondents would point out that the considerations

governing review on certiorari set forth in Rule 17.1(b) and (c), Revised Rules of the Supreme Court of the United States (RES.APP.B), are not met in this case. Further, since a federal question does not exist in the present case, this Court does not have jurisdiction to exercise its certiorari jurisdiction pursuant to U.S.C. §1257(3). (RES.APP.A) as the Petitioners have asserted.

> 2) Did the Florida Courts deprive Petitioners of equal protection of the law in applying common law principles dealing with purging usury and waiver to this case, rather than Florida's Criminal Usury Statute where it appears from the record that:
>
> a. No usury violation had occurred;

Respondents support their position that the Florida Courts did not deny Petitioners equal protection by applying common law principles rather than the Florida's Criminal Usury Statute, by arguing that the Petitioners waived any usury defense they may have had at the time they entered into the subject Stipulation or, alternatively, there was no usury violation by the Respondents in this case.

First, with respect to the question of whether a usury violation occurred in the instant case, Respondents point out to this Court that the primary purpose of the usury law is to protect needy borrowers by penalizing unconscionable money lenders. *STUBBLEFIELD V. DUNLAP,* 4 So.2d 519 (Fla.1941). The four requirements for a usurious transaction under Florida law are:

> "(1) There must be a loan express or implied;
>
> (2) An understanding between the parties that

> the money lent shall be returned;
>
> (3) That for such a loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid as the case may be; and
>
> (4) There must exist a *corrupt intent* to make more than the legal rate for the use of the money loaned." *DIXON V. SHARP,* 276 So.2d 817, 819 (Fla.1973).

The Petitioners admit in their own brief that the usury statute, "...protects Florida citizens who may not be in a position to protect themselves when dealing with lenders." (PET.BR. Page 8).

The Respondents assert that the case at bar is not a situation where you are dealing with a consumer loan between an unknowledgeable needy borrower and a shrewd unconscionable money lender. Initially, this was an investment situation wherein the borrowing corporations (Petitioners) were acting through two of their officers and/or directors who were a lawyer and a former bank officer; whereas the investors/lenders (Respondents) were average consumers. Therefore, since the borrowers had the superior knowledge in this case, this is not the type of transaction for which the usury statutes were enacted to prohibit. Also, although it may be argued that the initial investment arrangement constituted a loan and therefore met the first requirement of a usury transaction as cited above, it is doubtful that the subsequent Stipulation entered into between the parties to settle their losses would constitute a loan transaction.

The Respondents also maintain that the fourth requirement of a usurious transaction is clearly not met in

this case. In this regard, the Florida Supreme Court held in *DIXON V. SHARP* that:

> "Florida courts recognize that usury is largely a matter of intent, and is not fully determined by the fact that the lender actually receives more than the law permits, *but is determined by existence of a corrupt purpose in the lender's mind to get more than legal interest for the money lent.* ... To work a forfeiture under the statute the principal must knowingly and willingly charge or accept more than the amount of interest prohibited. ... The difference between a lawful transaction and a usurious one, therefore, is *the difference between 'good faith' and 'bad faith'.*" *DIXON* at 820 and 821.

Respondents submit that the record before the Florida Courts fails to show even the slightest bit of evidence of a corrupt intent by the Respondents in these transactions. With respect to the initial investment transaction, it was the Petitioners who had the superior knowledge. As far as the Stipulation is concerned, the Respondents assert the fact that it was the Petitioners who supplied the agreed payoff amounts in Paragraph 1 of the Stipulation and these figures were not by the suggestion of the Respondents. Accordingly, there was no "corrupt intent" by the Respondents in the instant case. The Respondents were not aware that they may have been violating any usury law and they were only acting in good faith throughout their entire dealings with the Petitioners.

Lastly, with respect to this issue, Respondents would point out that the Stipulation in question was entered into to settle their lawsuit against the Petitioners and both sides were represented by counsel. Settlement

agreements are binding upon the parties and upon the court and they are highly favored by the Florida courts. *DORSON V. DORSON,* 393 So.2d 632 (Fla. 4 DCA 1981).

b. The Petitioners waived any usury defense they may have had.

The Respondents' second and main argument in support of their position that the Petitioners were not denied equal protection of the law in the instant case is the fact that the Petitioners waived any usury defense they may have had when they entered into the subject Stipulation. Since the Florida Supreme Court held in the case of *GUNN PLUMBING, INC. V. DANIA BANK,* 252 So.2d 1 (Fla.1971), that the affirmative defense of usury could be waived in circumstances such as those presented in the instant case, the Florida Courts did not deprive the Petitioners of equal protection of the law by applying the common law principles in that case rather than the Florida Criminal Usury Statute. As the following argument maintains, the *GUNN PLUMBING* decision was not impliedly overruled by nor is it contradictory to the provisions of Florida's Criminal Usury Statutes, §687.071.

As indicated by the ruling of the trial court and by the opinion of the Fourth District Court of Appeal, the case at bar was decided upon the authority of the Supreme Court of Florida's decision in the *GUNN PLUMBING* case. In *GUNN PLUMBING, INC.,* the defendants executed and delivered a promissory note to the plaintiff. This note was not paid at maturity and the plaintiff then accepted a renewal promissory note. When the renewal note was not paid at its maturity, the plaintiff instituted suit against the defendants and the defendants interposed

the defense of usury. This suit was later settled between the parties pursuant to a written stipulation. The defendants defaulted under the stipulation and the plaintiff again instituted suit. In this later suit, the defendants filed their Answer and attempted to raise the affirmative defense of usury.

In *GUNN PLUMBING, INC.*, the Florida Supreme Court acknowledged its earlier opinion in *CARTER V. LEON LOAN & FINANCE CO.*, 146 So. 664 (Fla.1933), wherein it held that if a contract is usurious at the time of its inception, no subsequent transaction will purge the original transaction of is usurious nature unless the subsequent transaction gives up and abandons every element of usury charged to exist in the first loan contract. However, in *GUNN PLUMBING, INC.*, the Court held that it was not necessary to determine whether or not every element of usury charged to exist in the original contract was abandoned by the subsequent contract between the parties because, as held by the Court:

> "...Usury is purely a personal defense created by statute for the protection of borrowers and, therefore, any borrower may waive his right to claim the benefit of such statute...moreover, usury being a purely personal defense which may be availed of, or waived, at the election of the party aggrieved, it has no especial claims upon the indulgence and favor of the court, but must be disposed of upon the same principles and in the same manner as other defenses." *GUNN PLUMBING, INC.* at 4.

The court further held that:

> "The usury statute in this State does not have the effect of invalidating contracts for interest at a rate higher than the statutory maximum, but only accords to the obligor the privilege of setting up, or waiving, affirmative defenses of usury in respect to such contracts." *GUNN PLUMBING, INC.* at 4.

Relying on this reasoning, in that case the Florida Supreme Court held that the District Court of Appeal was correct in holding that the defense of usury had been waived by the defendants when they entered into the joint stipulation with the plaintiff.

Just as in the *GUNN PLUMBING* case, in the instant case the Petitioners waived any defense of usury they may have had to the original notes when they entered into the joint Stipulation in question. Although the Petitioners would have this Court believe otherwise (see PET.BR., page 9, footnote No. 1) such waiver language does exist in the Stipulation between the parties. In this Stipulation it is provided that, "...the following agreements shall be accepted by the parties *as a resolution of the issues necessarily involved in the captioned cases* and any judgments flowing therefrom." (PET.APP.A, emphasis added). It should be noted that the trial court agreed that such language in the Stipulation constituted a waiver of *all* of the defenses that Petitioners may have had, including usury.

The Petitioners also attempt to distinguish the *GUNN PLUMBING* case by arguing that in the present case, unlike *GUNN PLUMBING*, the old usury was carried forward into the new contract. (PET.BR., Page 9, footnote No. 1). Respondents submit that the foregoing fact is not a distinguishing one because the very holding of the *GUNN PLUMBING* case is that it is no longer necessary for a court to determine whether or not every element of

usury charged to exist in the original contract was abandoned by the subsequent contract between the parties if the court finds that the borrower had waived his right to claim a usury defense.

Lastly, in an apparent effort to convince this Court that the *GUNN PLUMBING* case is not controlling in the instant case, the Petitioners argue that since §687.071, Florida Statutes, was enacted in 1969 and was therefore not in force at the time the promissory notes were executed in the *GUNN PLUMBING* case, then this statute supersedes and impliedly overrules the Florida Supreme Court's holding in *GUNN PLUMBING, INC.* (PET.BR. Page 8).

In response to this argument, the Respondents respectfully submit to this Court that the enactment of §687.071 in 1969 does not affect the holding in the *GUNN PLUMBING* case. Petitioners are impressed by the language contained in subsection 7 of §687.071, which states:

> "(7) No extension of credit made in violation of any of the provisions of this section shall be an enforceable debt in the courts of this state."

Section 687.07, Florida Statutes (1965), which was the criminal usury statute in effect at the time the promissory notes were entered into in the *GUNN PLUMBING* case, had a provision similar to that found in §687.071(7). This former criminal usury statute provided, in relevant part, that if the lender shall violate that criminal usury statute, the lender:

> "...Shall forfeit the entire sum, both the principal

> and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor,..." (RES.APP.C).

Since the lender forfeits his entire principal and interest under §687.07, this has the same effect as the lender being unable to enforce his debt in the courts pursuant to the new statute, §687.071. Therefore, since the Florida Supreme Court was charged with the knowledge of §687.07 at the time it decided in *GUNN PLUMBING, INC.* that the usury defense could be waived, Respondents submit that enactment of §687.071 in 1969 in no way affected the Florida Supreme Court's decision in that case.

In the case of *IN RE: ESTATE OF BLANKENSHIP*, 122 So.2d 466 (Fla.1960), the Florida Supreme Court held that:

> "It does not follow as a matter of course that a court decision interpreting a statute is rendered inapplicable ipso facto by a subsequent amendment to the statute. The effect of the decision as binding precedent must in each instance be determined by the nature and effect of the amendment to the statute as well as by the breadth of the court decision and the questions decided in it, as those questions may be applicable to the statute after amendment." *BLANKENSHIP* at 470.

Based upon the foregoing, the Respondents respectfully submit that the public policy of the State of Florida still is, even after the change in the Criminal Usury Statute in 1969, that usury is a purely personal defense which can be waived. The Florida Supreme Court's holding in the *GUNN PLUMBING* case is still good law in the State of Florida and this was confirmed by the rulings of the Fourth

District Court of Appeal and the Supreme Court of Florida in the instant case.

CONCLUSION

The record before the Florida Courts shows that the Respondents did not violate Florida's Criminal Usury Statute, or alternatively, the Petitioners waived any usury defense they may have had by entering into the subject Stipulation. Accordingly, the Florida Courts did not deprive the Petitioners of the right to equal protection by applying the waiver principles of the *GUNN PLUMBING* case rather than Florida's Criminal Usury Statute. Further, the orders and opinions of the Florida Trial and Appellate Courts were based upon adequate non-federal grounds and the Petitioners did not present a federal question in the Florida Courts and are first raising it in this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

28 U.S.C. §1257(3)

§1257. STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

APPENDIX "B"

RULE 17.1(b) AND (c), Revised Rules of the Supreme Court of the United States

RULE 17. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

APPENDIX "C"

SECTION 687.07, FLORIDA STATUTES (1965)

687.07 FORFEITURE AND PENALTY IN CASE OF EXCESSIVE INTEREST OR CHARGES.—

Any person, or the agent, officer or other representative of any person, lending money in this state who shall willfully and knowingly charge or accept any sum of money greater than the sum of money loaned, and an additional sum of money equal to twenty-five per cent per annum upon the principal sum loaned, by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, assignment of salary or wages, inspection fees or other fees or otherwise, or for forbearing to enforce the collection of such moneys or otherwise, shall forfeit the entire sum, both the principal and the interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor, and on conviction, be fined not more than one hundred dollars, or be imprisoned in the county jail not more than ninety days.